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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARGUERITE HIKEN and
THE MILITARY LAW TASK FORCE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE
and UNITED STATES
CENTRAL COMMAND,

Defendants.

Case No. CV-06-2812 (MHP)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN INTERIM FEE AWARD PER 5 U.S.C. § 552(a)(4)(E); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: March 29, 2010
Time: 2 p.m.
Courtroom: 15, 18th floor

Judge: Hon. Marilyn H. Patel

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NOTICE OF MOTION

TO THE HONORABLE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 29, 2010 at 2 p.m. in Courtroom 15 of the Honorable Marilyn H. Patel, United States District Judge, at the United States Courthouse, for the Northern District of California, 450 Golden Gate Avenue, 18th Floor, San Francisco, California 94102, Plaintiffs MARGUARITE HIKEN and the MILITARY LAW TASK FORCE will and hereby do move this Court to issue an Order awarding attorney fees under 5 U.S.C. § 552(a)(4)(E) in the amount of $211,082.30.

This motion is based upon the attached memorandum of points and authorities, the attached declarations and exhibits, the pleadings and papers filed in this case, and such written and oral arguments as may hereinafter be made by the parties.

DATED: February 16, 2010 BY: /s/
Chris Ford
Counsel for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs request that this Court order defendants to pay plaintiffs' attorney fees for the first phase of litigation in this case, which culminated with the Court's October 2, 2007 Order ("2007 Order"). *Hiken v. Dep't. of Defense*, 521 F.Supp.2d 1047 (N.D. Cal. 2007) ("*Hiken*"). The Court ordered defendants to release to plaintiffs all segregable portions of documents relating to the Rules of Engagement ("ROE"), which were previously withheld in their entirety, and route and unit names from the AR 15-6 report. Within a month of the Court's Order, defendants provided plaintiffs with 117 pages of documents related to the ROE and a revised version of the AR 15-6 report with significantly fewer redactions than in the prior version released to plaintiffs.

Plaintiffs made their FOIA request via letter dated March 17, 2005. Although the FOIA requires a response in no more than twenty business days, nearly six months passed before defendants communicated their decision to deny plaintiffs' request. A short time later, plaintiffs submitted an administrative appeal, dated September 26, 2005, to defendant Department of Defense ("DoD"), as instructed by defendant U.S. Central Command ("CENTCOM"). Exhibit 4 to Defendants' Motion for Summary Judgment ("Ds' MSJ"), Dkt. No. 18. Defendants failed to respond to the appeal within twenty days as the statute requires, but assured plaintiffs that their appeal was on the "front burner" and would be "simple" to resolve. Exhibit A to Plaintiffs' Motion for Summary Judgment ("Ps' MSJ"), Dkt. No. 21. However, after 19 months of waiting for a response, plaintiffs concluded that the government would not release the requested information without court intervention. Plaintiffs thus filed the complaint in this matter on April 25, 2006. Complaint, Dkt. No. 1. Nearly six months later, defendants communicated to plaintiffs their denial of the appeal – affirming plaintiffs' conclusion that court intervention was necessary to obtain the requested information. Exhibit 6 to Ds' MSJ, Dkt. No. 18.

The parties filed cross motions for summary judgment, and the Court held a hearing on these motions on March 26, 2007, after which it issued the 2007 Order. As is detailed *infra*, plaintiffs' lawsuit and the 2007 Order were clearly necessary to obtain the requested materials from defendants, and defendants' dilatory conduct underscored the lack of a reasonable basis for

withholding the requested information. Furthermore, plaintiffs sought the disclosures for a scholarly, journalistic enterprise the purpose of which is to provide a public benefit – specifically a better understanding of whether the U.S. Military acted lawfully in certain events during the war in Iraq. Moreover, the number of hours and hourly rates of plaintiffs' attorneys are reasonable, and given plaintiffs' lack of wherewithal and the economic hardship that would attend continued litigation in this matter, an award of interim fees is appropriate.

II. ARGUMENT

To receive an award of attorney fees, a FOIA requester must show that s/he has "substantially prevailed" in the litigation. 5 U.S.C. § 552(a)(4)(E)(i).[1] Where, as here, a plaintiff requests an award of interim fees, "[t]he issue to be decided . . . is whether plaintiff has substantially prevailed in the first phase of this litigation by securing release of the documents responsive to his request." *Powell v. U.S. Dept. of Justice* ("*Powell*"), 569 F.Supp 1192, 1199 (N.D. Cal. 1983).

A plaintiff who successfully shows that s/he has substantially prevailed is eligible for attorney fees – but the plaintiff also must show entitlement to fees, which is determined by applying case law-derived criteria. *Church of Scientology of California v. U.S. Postal Service* ("*Church of Scientology*"), 700 F.2d 486, 489-494 (9th Cir. 1983). Once the plaintiff has demonstrated eligibility and entitlement to fees, the final step is for the court to determine whether the fees are reasonable. *E.g. Long v. I.R.S*, 932 F.2d 1309, 1313-14 (9th Cir. 1991).

Not only have plaintiffs here made the requisite showings for a fee award, as demonstrated *infra*, but such an award would further the underlying purpose of the FOIA's attorney fees provisions. "The touchstone of a court's discretionary decision under section 552(a)(4)(E) must be whether an award of attorney fees is necessary to implement the FOIA. A grudging application of this provision, which would dissuade those who have been denied information from invoking their right to judicial review, would be clearly contrary to congressional intent." *Davy v. C.I.A.*, 550 F.3d

[1] All statutory references are to Title 5 of the United States Code.

1155, 1158 (D.C. Cir. 2008). Therefore, courts approach interim motions for fees in FOIA litigation with a liberal leaning towards awarding fees when plaintiffs have prevailed. Based on plaintiffs' showing here, this Court should grant plaintiffs' Motion for an Interim Fee Award.

A. PLAINTIFFS PREVAILED UNDER *BUCKHANNON* AND THUS ARE ELIGIBLE FOR AN ATTORNEY FEE AWARD BECAUSE THEY OBTAINED "SOME RELIEF" FROM THIS COURT.

Plaintiffs have prevailed and are eligible for an attorney fee award pursuant to *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 601, 610. (2001) ("*Buckhannon*"). In *Buckhannon*, the Supreme Court expressly rejected the catalyst theory of fee recovery.[2] *Buckhannon*, 532 U.S. at 603. The *Buckhannon* Court held that a party prevails for the purpose of obtaining a fee award only when it "has been awarded some relief by [a] court." *Id*. at 603. The *Buckhannon* standard applies in FOIA cases. *E.g. Davis v. Dept't of Justice*, 460 F.3d 92, 105 (D.C. Cir. 2006). Under *Buckhannon*, courts apply a two-part test to determine whether a party has prevailed. Under this test, a plaintiff must "establish[] that [its] federal court action[] resulted in a 'material alteration of the legal relationship of the parties' and that the alteration was 'judicially sanctioned.'" *Li v. Keisler*, 505 F.3d 913, 917 (9th Cir. 2007) (quoting *Buckhannon*, 532 U.S. at 604-05).

In the present case, the Court's 2007 Order materially altered the legal relationship between the parties and constitutes the kind of judicial imprimatur envisioned by the *Buckhannon* Court. *See*

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[2] Congress restored the catalyst theory with the enactment of the Openness Promotes Effectives in our National Government Act ("OPEN Government Act"), signed into law in December 2007. *Wildlands CPR v. U.S. Forest Service*, 558 F.Supp.2d 1096, 1097-98 (D. Mont. 2008). By passage of the Act, the provisions in § 552 (a)(4)(E) "replaced" the *Buckhannon* analysis. *Id*. at 1098. Under the new provisions, a party who has obtained relief through "(I) a judicial Order, an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency" has substantially prevailed. § 552(a)(4)(E)(ii). At least one district court, however, has found that the OPEN Government Act is not retroactive. *Zarcon, Inc. v. N.L.R.B.*, 2008 WL 4960224 (W.D. Mo. 2008). The attorney fees here at issue derive from litigation that preceded this Court's Order handed down on October 2, 2007, prior to the enactment of the Act. Plaintiffs do not address the applicability of the Act under the present circumstances.

Preservation Coalition of Erie County v. Federal Transit Admin., 356 F.3d 444, 451 (2nd Cir. 2004). Specifically, the Court ordered defendants, *inter alia*, to produce to plaintiffs all segregable portions of the documents relating to the Rules of Engagement ("ROE") as well as information concerning certain names assigned to particular routes or units in the AR 15-6 report. *Hiken*, 521 F.Supp.2d at 1060. Within a month, defendants released two compact disks with 117 pages of previously withheld documents related to the ROE.[3] By requiring defendants to release to plaintiffs materials responsive to plaintiffs' FOIA request, this Order created a judicially sanctioned change in the relationship of the parties and "awarded some relief" to plaintiffs. *Buckhannon*, 532 U.S. at 603-606. Thus, plaintiffs have substantially prevailed under *Buckhannon*.

B. PLAINTIFFS ARE ENTITLED TO ATTORNEY FEES.

Once a court has determined that a party has substantially prevailed and is thus eligible for attorney fees, it may, in its discretion, determine whether the party is "entitled" to such fees by taking into account such factors as "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; . . . (4) whether the government's withholding of the records sought had a reasonable basis in law"; and "whatever [other] factors it deems relevant in determining whether an award of attorney's fees is appropriate." *Church of Scientology*, 700 F.2d at 492. (internal quotation marks omitted).

The first three factors "assist a court in distinguishing between requesters who seek documents for public informational purposes and those who seek documents for private advantage. The former engage in the kind of endeavor for which a public subsidy makes some sense, and they typically need the fee incentive to pursue litigation; the latter cannot deserve a subsidy as they benefit only themselves and typically need no incentive to litigate." *Davy*, 550 F.3d at 1160. Thus, when a court evaluates entitlement to fees in a FOIA action, "a distinction is to be drawn between

[3] Plaintiffs have not filed materials stored on these disks as exhibits because defendants notified plaintiffs by letter dated October 31, 2007 that defendants also provided the materials to the Court.

the plaintiff who seeks to advance his private commercial interests . . . and a newsman who seeks information to be used in a publication or the public interest group seeking information to further a project benefiting the general public." *Id*. at 1158. As demonstrated below, plaintiffs here have sought the requested materials not for commercial benefit but for the benefit of the public.

1. Disclosure of the Requested Documents "Furthers a Project Benefiting the General Public."

This Court recently noted that the first factor, pertaining to the public benefit derived from the case, "relates to the degree of dissemination and likely public impact from disclosure of the requested information. . . . Types of requests that might justify fee awards include a request for information to be used in a publication or a request by a public interest group for information that furthers a project benefitting the general public." *American Small Business League v. U.S. Small Business Admin. ("ASBL")*, 2009 WL 1011632 *3 (N.D. Cal. 2009) (citing *Church of Scientology*, 700 F.2d at 493 & 493 n.6). Further, "[t]he information need not be of public interest as long as there is a public benefit from the fact of its disclosure." *O'Neill, Lyasght & Sun v. D.E.A.*, 951 F.Supp. 1413, 1423 (C.D. Cal. 1996) (citing *Church of Scientology* 700 F.2d at 493).

Plaintiffs, Marguerite Hiken and the National Lawyers Guild's Military Law Task Force ("MLTF"), a nonprofit organization, requested the information at issue in this litigation for the purpose of preparing an article for publication in "On Watch," the newsletter of the MLTF. Exhibit 1 to Ds' MSJ, Dkt. No. 18. On Watch, published on and available free to all via the Internet, informs the public regarding the activities of the U.S. military. *Id*.

2. The Nature of Plaintiffs' Interest is Scholarly, Journalistic and in the Public Interest.

The second and third factors of the entitlement test "are often considered together." *Los Angeles Gay & Lesbian Community Services Center v. IRS* ("*LAGLCSC*"), 559 F.Supp.2d 1055, 1060 (C.D. Cal. 2008); *accord*, *Church of Scientology*, 700 F.2d at 494 (courts have found it "logical to read the two criteria together"). Specifically,

> [t]he second factor, commercial benefit to plaintiff, and the third factor, the nature of plaintiff's interest in the information sought, relate to whether the plaintiff requested information for a private commercial benefit only or whether the public interest benefited from the release of the requested information. . . . For example, a court might allow recovery of attorneys' fees for an indigent plaintiff or a non-profit public interest group, but not for a large corporate plaintiff.

ASBL, 2009 WL 1011632, at *3 (citing *Church of Scientology*, 700 F.2d at 493 n.6, 494); *see also O'Neill*, 951 F.Supp. at 1424 (fee award justified where requestor's interest is neither private nor personal). Additionally, "a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, [unless] ... his interest was of a frivolous or purely commercial nature," *Davy*, 550 F.3d at 1160-61 (quoting *Fenster v. Brown*, 617 F.2d 740, 742 n. 4 (D.C. Cir. 1979) (alteration in the original) (internal quotation marks omitted).

Here, plaintiffs enjoy no private or commercial benefit from disclosure of the materials the Court ordered disclosed. Declaration of Marguerite Hiken, May 29, 2009 ("Hiken Dec."), para. 4. The purpose of the article the MLTF seeks to publish based on the requested materials is to inform the public about important issues pertaining to the government's foreign policy decisions. FOIA request letter, Exhibit 1 to Ds' MSJ, Dkt. No. 18; Complaint, Dkt. No. 1, paras. 6-7. The MLTF's newsletter, On Watch, is made available online at no charge. Hiken Dec., para. 4. Thus, plaintiffs' interest in the information is scholarly, journalistic and public-interest oriented. It is not frivolous or of a commercial nature, and the requesters' interests is neither private nor personal. Hiken Dec., paras. 3-4. Accordingly, plaintiffs have satisfied both the second and third factors of the entitlement test.

3. There is No "Reasonable Basis" for Defendants' Withholding.

To satisfy the "reasonable basis in law" factor, the government must show that (1) "it had a reasonable basis in law for concluding that the information in issue was exempt" *and* (2) "it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *Fenster*, 616 F.2d at 744. The first factor "relates to whether the government agency's actions appeared to have a 'colorable basis in law' or instead appeared to be carried out 'to frustrate the

requester.'" *ASBL*, 2009 WL 1011632, at *4. "The question is not whether [the requestor] has affirmatively shown that the agency was unreasonable, but rather whether the agency has shown that it had any colorable or reasonable basis for not disclosing the material until after [requestor] filed suit." *Davy*, 550 F.3d at 1163. Even if the government's argument "is found on a colorable basis in law," that does not foreclose fee recovery by plaintiff; rather, this fact "is merely weighed along with the other factors." *Wheeler v. IRS*, 37 F.Supp.2d 407, 414 (W.D. Pa. 1998).

Regarding the second factor for determining whether the government has a reasonable basis for withholding, courts take such a dim view of obdurate behavior that upon a plaintiff's showing of such behavior, a court need not consider the first three fee-entitlement factors – public benefit, commercial nature, and nature of complainant's interest. Recalcitrance and obduracy, according to the *Wheeler* Court, can make the fee-entitlement factor pertaining to reasonable basis "dispositive" in favor of a plaintiff "without consideration of any of the other factors." *Wheeler*, 37 F.Supp.2d at 414. For instance, "if [an agency] had engaged in dilatory tactics simply to avoid a disclosure obligation, then its conduct might well qualify as 'recalcitrant' or 'obdurate' and hence unreasonable." *Peter S. Herrick's Customs and Intern. Trade Newsletter v. U.S. Customs and Border Protection*, 2006 WL 3060012, at *10, 34 Media L. Rep. 2460 (D.D.C. 2006). In another example, an agency's failure to respond to the plaintiff's request for twenty months following plaintiff's final payment of copying costs "demonstrates recalcitrance and obduracy." *Read v. F.A.A.*, 252 F.Supp.2d 1108, 1112 (W.D. Wash. 2003).

In *Wheeler*, the agency placed the plaintiff's FOIA request "on the back burner" until the complaint was filed, then "located some files." *Wheeler*, 37 F.Supp.2d at 410, 414. After some delay, an agency employee, on suggestion by counsel, searched through some previously unexamined boxes of materials and found two responsive documents. *Id*. The agency attempted to explain away the delay by citing a merger between two offices. *Id*. The court, however, did not credit that explanation, finding that the agency's actions "indicate a lack of even a colorable basis in law." *Id*.

a. Defendants' Dilatory Conduct Demonstrated "Recalcitrance" and "Obduracy," Justifying an Order for Attorney Fees on This Basis Alone.

Defendants have demonstrated recalcitrance and obduracy throughout both the administrative and litigation phases of the within matter. For example, during the administrative phase, defendants waited nearly half a year to communicate their denial of plaintiffs' initial FOIA request. *See* Ps' MSJ at 12:11-16. Then, despite defendants' claims that they had placed plaintiffs' administrative appeal on the "front burner," defendants instead threw it on the back burner for *more than a year* before finally denying it. *Id*. at 12:16-13:1. Thus, defendants' dilatory behavior spanned approximately nineteen months – a very similar amount of time to the twenty months of delays found in *Read* to "demonstrate[] recalcitrance and obduracy." *Read*, 252 F.Sup.2d at 1112.

Defendants' dilatory behavior continued throughout the litigation. For example, defendants failed to segregate and release non-exempt ROE materials until this Court ordered them to do so. Furthermore, defendants justified this failure by falsely claiming that "[t]he only non-exempt information that could be segregated would consist of lists of references or heading titles such as 'General Guidance' or 'Definitions' that, if released, would be of no informational value." Declaration of Major General Timothy F. Ghormley, USMC, Exhibit 2 to Ds' MSJ, Dkt. No. 18, at para. 7. However, when defendants subsequently released 117 pages of ROE materials upon this Court's Order, the materials revealed much more than just heading titles. *Id*.

Defendants further prolonged the litigation by conducting an inadequate search. Defendants' original *Vaughn* Index identified only four ROE-related documents. *Vaughn* Index, Exhibit A to Ds' MSJ ("Ds' *Vaughn* Index"). The Court criticized the government's search that resulted in only these four documents, citing the "lack of specific search terms," the "general nature of the description contained in the affidavit," and "evidence that the results of the search failed to produce responsive documents." *Hiken*, 521 F.Supp.2d at 1054-55. Defendants claimed they were unable to provide more information about the original search, so instead of providing a declaration further explaining the original search, defendants executed a new search with plaintiffs' consent and the Court's permission. Defendants' Renewed Motion for Summary Judgment ("Ds' Renewed

MSJ"), Dkt. No. 66, at 1:21-23. Defendants located twelve additional documents as a result of their new search. Defendants' Revised *Vaughn* Index, Exhibit A to Defendants' Renewed Motion for Summary Judgment ("Ds' Revised *Vaughn* Index"), Dkt. No. 66-2.

Moreover, defendants additionally prolonged the litigation by withholding essential facts the release of which would undermine their untrue assertion that the AR 15-6 report was "leaked" onto their Web site and thus not an official disclosure. Defendants' Reply in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment, Dkt. No. 35, at 3-4; Ghormley Supp. Decl., Dkt. No. 36, paras. 3-5. This imposed an unwarranted delay in the litigation, evidenced by this Court's statement that it lacked sufficient evidence to determine whether defendants' release of the AR 15-6 report was official. *Hiken*, 521 F.Supp.2d at 1057. In light of such recalcitrance and obduracy on the part of defendants, this Court should find that plaintiffs are entitled to fees based on this factor alone. *Wheeler*, 37 F.Supp.2d at 414.

b. Defendants' Actions Lacked a "Colorable Basis."

Even if defendants' dilatory behavior is not seen as demonstrating the kind of recalcitrance or obduracy found in *Read*, defendants had no colorable basis in law for withholding the materials the Court ultimately ordered disclosed. *See ASBL*, 2009 WL 1011632, at *4. For example, in *Wheeler*, the defendants' locating "some files," then later, *on suggestion of their own counsel*, performing further searches and finding responsive documents, "indicate[d] a lack" of a colorable basis in law. *Wheeler*, F.Supp.2d at 414.

Here, defendants searched some file cabinets and electronic files, but failed to meet the basic search standards enunciated by the courts – despite having taken many months to respond to plaintiffs' request. *See* Plaintiffs' Reply in Support of Their Motion for Summary Judgment and Opposition to Defendants' Reply at 11:6-12:20; *Hiken*, 521 F.Supp.2d at 1054. Consequently, this Court, citing "[t]he lack of specific search terms and the general nature of the description contained in the affidavit in combination with evidence that the results of the search failed to produce responsive documents," found it necessary to conduct *in camera* review to determine the adequacy

of defendants' search for responsive information. *Hiken*, 521 F.Supp.2d at 1054-55.

Here, as in *Wheeler*, defendants' lengthy delays and failure to perform an adequate search "appeared to be carried out 'to frustrate the requester.'" *ASBL*, 2009 WL 1011632, at *4. Moreover, as this Court found, defendants lacked a colorable basis in law to not segregate and release information contained in the four documents listed in their initial *Vaughn* index. *Hiken*, 521 F.Supp.2d at 1060. Under these circumstances, the Court should find that defendants lacked a colorable basis for their withholding and that plaintiffs are therefore entitled to attorney fees in this matter.

C. THE COURT SHOULD ORDER DEFENDANTS TO PAY PLAINTIFFS THE LODESTAR AMOUNT.

Once a plaintiff has demonstrated eligibility for and entitlement to attorney fees, courts scrutinize the attorneys' billing statements for "reasonableness of (a) the number of hours expended and (b) the hourly fee claimed. If these two figures are reasonable, then there is a strong presumption that their product, the lodestar figure, represents a reasonable award." *LAGLCSC*, 559 F.Supp.2d at 1060 (quoting *Long v. IRS*, 932 F.2d at 1313-14) (internal quotation marks omitted); *accord*, *ASBL*, 2009 WL 1011632, at *4 ("if the submitted number of hours and the hourly rate are reasonable, then there is a 'strong presumption' that their product is a reasonable award"). Generally, "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Miller v. Holzmann*, 575 F.Supp.2d 2, 11 (D.D.C. 2008) (internal quotation marks omitted).

In addition, a court may authorize "an upward or downward[4] adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the case overcome this strong presumption and indicate that such an adjustment is necessary." *LAGLCSC*, 559 F.Supp.2d 1055,

[4] Worth noting is that one Ninth Circuit court appears to have limited a court's authority to adjust downward from the lodestar figure. *See Long v. IRS*, 932 F.2d at 1316.

1060. This Court, for example, adjusted a lodestar figure upward by applying a multiplier of 1.5 where the attorney worked *pro bono* for his client, and the attorney's work was "at a higher level of competence than that of attorneys with similar experience." *Powell*, 569 F.Supp. at 1204.

The attorneys for plaintiffs herein support their lodestar billing rates by showing their rates in similar cases; what they command in the marketplace; actual billing practices during the course of the litigation; and recent fees awarded, based on actual evidence of prevailing rates, to attorneys of comparable reputation and experience performing similar work. *See generally National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325-28 (D.C. Cir. 1982); Declaration of Colleen Flynn ("Flynn Dec."); Declaration of Chris Ford ("Ford Dec"); Declaration of Gordon Kaupp ("Kaupp Dec."); Declaration of Carol Sobel ("Sobel Dec."); Declaration of Kenneth Kreuscher ("Kreuscher Dec."); Declaration of Thomas Burke ("Burke Dec.").

Plaintiffs' counsel, for example, maintained contemporaneous, complete and standard time records that accurately reflect the work performed by each attorney. 675 F.2d at 1327. Flynn Dec., para. 10; Ford Dec., para. 10; Kaupp Dec., para. 14; Kreuscher Dec., para. 14. Further, lead counsel Colleen Flynn demonstrates that her reasonable market billing rate is $350 per hour. Flynn Dec., para. 9. Co-counsel Chris Ford, W. Gordon Kaupp and Kenneth Kreuscher demonstrate that their reasonable market billing rates are $325 per hour, $400 per hour, and $300 per hour, respectively. Flynn Dec., para. 9; Ford Dec., para. 9; Kaupp Dec., para. 11.; Kreuscher Dec., para 13. Plaintiffs have prepared a table showing each of their attorneys' hours worked in the first phase of this litigation and in preparing the within motion, their reasonable billing rate, and their presumptively reasonable lodestar figures. *ASBL*, 2009 WL 1011632, at *4; Flynn Dec., para. 14. The total of fees owed plaintiffs is $211,082.30. *Id*. The Court should award plaintiffs the total amount of attorney fees sought herein.

D. AN ORDER OF INTERIM ATTORNEY FEES IN THIS MATTER IS JUSTIFIED.

FOIA requesters may be awarded interim fees "because Congress intended § 552(a)(4)(E) to operate like comparable provisions elsewhere in the U.S. Code, under which interim fees are

clearly available." *Rosenfeld v. U.S.*, 859 F.2d 717, 724 (9th Cir. 1988). The *Rosenfeld* Court further explained,

> [w]hen citizens must litigate against the government to obtain public information, especially when, as here, release of the withheld records appears to be in the public interest rather than for merely private commercial gain, *it is entirely appropriate that interim fee awards be available to enable meritorious litigation to continue*. We do not believe that Congress, after waiving sovereign immunity from attorney's fees for citizens seeking the release of information, would countenance the government's dragging its heels, thereby forcing impecunious litigants to abandon their quest.

Rosenfeld, 859 F.2d at 725 (emphasis added). "If the court lacks authority to grant such an interim award, the [c]ongressional purpose in adopting § 552(a)(4)(E) would, *pro tanto*, be frustrated: the litigation would wither and die; the records sought would remain undisclosed. The availability of a final award in such circumstances would be fools gold only." *Biberman v. F.B.I.*, 496 F.Supp. 263, 265 (S.D.N.Y. 1980); *see also Allen v. F.B.I.*, 716 F.Supp. 667, 671 (D.D.C. 1989) (if interim fees were not available, the government "could circumvent the requirements of the FOIA and avoid full disclosure by a war of attrition. The availability of a final award of attorney fees would be like the end of a rainbow, unattainable.").

Significant to the present case, an interim fee award is appropriate where a party "has established his entitlement to some relief on the merits of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980). "*For an interim award of attorney's fees it is enough that the fee is high relative to the party's or its counsel's ability to continue financing the litigation*." *National Ass'n of Criminal Def Lawyers v. DOJ* ("*NACDL*"), 182 F.3d 981, 986 (D.C. Cir. 1999) (emphasis added). The *NACDL* Court affirmed a lower court finding that an interim award of attorney fees was warranted where "the protracted litigation had imposed a financial hardship upon counsel for NACDL" and the NACDL was able to show eligibility for and entitlement to fees. *Id*. at 982, 983, 987. Also worth noting is that where no documents would have been released but for a plaintiff's success in its lawsuit – as is the case here – one court found "no obstacle" to the plaintiff's recovery of an interim fee award. *See Allen*, 713 F.Supp. at 12-13.

In *Powell*, this Court distilled from legislative history four factors as a means to guide the decision on whether to grant interim fees:

1. Degree of hardship that delaying the fee award until conclusion of litigation imposes on plaintiff and his or her counsel;[5]
2. Whether there was unreasonable delay on the part of the government. Fees are justified where there was "inordinate" delay and "the use of dilatory tactics";
3. The length of time the case has been pending;
4. The likely period of time required before the litigation concludes.

Powell, 569 F.Supp at 1200.

1. The Court Should Grant Plaintiffs' Interim Fee Motion Based on the Hardship Continued Litigation Imposes on Plaintiffs and Their Counsel.

In the instant case, the degree of hardship on plaintiffs in continuing this long-running litigation is extreme, and plaintiffs cannot afford to finance continued litigation in this matter. Hiken Decl., para 6; Flynn Dec., para. 6; Ford Dec., para. 7; Kaupp Dec., para. 10; Kreuscher Dec., para. 10. Plaintiffs do not have the wherewithal to prosecute the kind of costly and drawn-out litigation entailed in asserting their rights under the FOIA. *See* Hiken Dec., paras. 5-6; Flynn Dec., para. 6; Ford Dec., para. 7; Kaupp Dec., para. 10; Kreuscher Dec., para. 10. In particular, plaintiff MLTF is a non-profit organization and lacks the budget necessary to pay its attorneys' hourly rates. *Id*., paras. 3, 5.

In addition, the litigation herein imposes a pronounced economic burden on counsel for plaintiffs, all sole practitioners[6] who have been carrying the costs and their fees in this case for more than three years. ; Flynn Dec., para. 6; Ford Dec., para. 7; Kaupp Dec., para. 10; Kreuscher Dec., para. 10. These attorneys have had overhead to pay and, as the nation's economy has soured, have experienced increased difficulty in securing consistently paying work. *Id*. Plaintiffs' counsel have devoted significant amounts of time to this case without having been paid, resulting in a

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[5] This Court noted that the Supreme Court has "relied heavily on this factor in upholding" an interim fee award. Where plaintiff cannot proceed with the litigation without the relief afforded by an award of interim attorney fees, "[t]his hardship alone may be enough to justify an interim award." *Powell*, 569 F.Supp. at 1200.

[6] Counsel Gordon Kaupp was a sole practitioner at all times during which he contributed to portion of the litigation here at issue, i.e. its first phase; subsequently, he joined a firm. *See* Kaupp Decl., paras. 5-7.

significant hardship. *Id*.

Furthermore, neither plaintiffs nor their attorneys have the wherewithal to continue the litigation without relief in the form of an interim fee award. Hiken Decl., para. 6. ; Flynn Dec., para. 6; Ford Dec., para. 7; Kaupp Dec., para. 10; Kreuscher Dec., para. 10. Based on the extent of this hardship alone, an interim fee award is justified, *Powell*, 569 F.Supp at 1200, and the Court should order defendants to pay plaintiffs' interim attorney fees.

2. Although Hardship Alone Should Be Sufficient, the Government's Inordinate Delays and Resort to Dilatory Tactics, and the Lengthiness of the Instant Proceedings Necessitate an Order for Interim Fees.

Although the hardship borne by plaintiffs and their attorneys should be sufficient on its own to support an interim fee award, such an award is even more justified because of Defendants' delays and dilatory tactics and because of the lengthiness of these proceedings. Defendants' unjustified delays during both the administrative phase and during the litigation are detailed *supra*, in part II.B.3.a. Moreover, plaintiffs filed their complaint in April 2006; thus, the instant proceedings have spanned more than three and a half years. At the most recent hearing the Court stated it would review certain documents *in camera*, indicate where exemptions "are not well taken," then give defendants an opportunity to respond – all before issuing a final order. Transcript of Proceedings, April 28, 2008, at 34:20-35:6. Therefore, Plaintiffs expect that this case may proceed for a significant amount of time into the future. In sum, Plaintiffs have well satisfied the requirements this Court set forth in *Powell* for a finding that interim fees are justified, and the Court should award interim fees to plaintiff.

IV. CONCLUSION

Based on the foregoing, the Court should issue an order that defendants pay plaintiffs' attorney fees as set forth herein.

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DATED: February 16, 2010

Respectfully submitted,

BY: _____

COLLEEN FLYNN
CHRIS FORD
W. GORDON KAUPP
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2010, a true and correct copy of the foregoing PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN INTERIM FEE AWARD PER 5 U.S.C. § 552(a)(4)(E); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF was served upon defendants' counsel of record via ECF at the address listed below:

Joseph C. Folio III
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530

DATED: February 16, 2010

CHRIS FORD